STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EARL ROSS,

Defendant-Appellant.

UNPUBLISHED
March 13, 2003

No. 237120
Crawford Circuit Court
LC No. 01-001909-FH

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree criminal sexual conduct, 750.520c(1)(a) (sexual contact with a victim under the age of thirteen). On September 19, 2001, the trial court sentenced defendant to thirty-six months probation, with the first twelve months to be served in the county jail. We affirm.

The trial transcript reveals that, while in a motel hot tub, defendant grabbed the ten-year-old female victim, sat her on his knee, placed his hand inside her swimsuit bottoms and fondled her genitalia. As part of his defense, defendant presented the testimony of four witnesses to attest to defendant's character for good sexual morals regarding children. Specifically, defendant's neighbor testified that she socialized with defendant and she never saw him act inappropriately around her eight-year-old daughter. According to the neighbor, defendant baby-sat her daughter and she would trust him to do so again. Three of defendant's co-workers also testified that they observed defendant interact with children and they never saw defendant act in a sexually inappropriate manner. One co-worker specifically testified that defendant would never do anything sexually inappropriate with a child.

Over defense counsel's objection, the prosecutor presented the testimony of rebuttal witness Joseph Whelton. According Whelton, he worked with defendant for four years and, nearly every day, defendant talked about his attraction to a thirteen-year-old, female neighbor. Whelton explained that defendant talked about how "she'd come over wearing see-through shirts" and how defendant "could see her breasts and nipples." Whelton further testified that defendant told him that the girl "let him feel her up" and that defendant said "he'd like to get in her pants." Whelton stated that defendant also discussed another girl in Alabama and that defendant talked about his attraction to young girls so often that Whelton and his co-workers would simply "have to walk away . . . ."

Defendant contends that the trial court abused its discretion by admitting Whelton's testimony because his statements regarding defendant's "mere discussions" with a co-worker did not concern defendant's reputation, character or conduct in the presence of children. We disagree.

"A trial court's decision regarding the admission of rebuttal testimony will not be disturbed absent an abuse of discretion." *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). In analyzing this issue, our courts have long held that "[a]n abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002).

Here, defense counsel introduced evidence of defendant's character pursuant to MRE 404(a)(1). Generally, under MRE 404(a), "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." However, under MRE 404(a)(1), if a defendant offers evidence to show "a pertinent trait of character," the prosecutor may offer character evidence in rebuttal. Therefore, it is well-established that " '[o]nce a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed.' " *People v Johnson*, 409 Mich 552, 558; 297 NW2d 115 (1980), quoting *People v Perez*, 66 Mich App 685, 693; 239 NW2d 432 (1976). Thus, under MRE 405(a), a prosecutor may rebut defendant's character evidence "by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant." *People v Whitfield*, 425 Mich 116, 131; 388 NW2d 206 (1986).

We hold that Whelton's testimony constituted proper rebuttal evidence. Defendant presented evidence that he has a healthy relationship with and has never acted in a sexually inappropriate way with or around children. Defendant introduced this character evidence to suggest that he did not commit this offense and that the allegations against him are contrary to or inconsistent with his character or reputation. In light of this defense, the issue of defendant's character for good sexual morals in the presence of young girls was a material issue at trial. See *People v Vasher*, 449 Mich 494, 504-506; 537 NW2d 168 (1995). To refute defendant's reputation and character evidence, Whelton's testimony established that defendant talked incessantly about sexually inappropriate ideations and behavior toward young girls. Furthermore, Whelton established that, contrary to the testimony defendant's other co-workers, Whelton and others at the company found defendant's repeated admissions about his attraction to and behavior around young girls so disagreeable that they felt compelled to leave defendant's presence.

Whelton's testimony tended to rebut the specific aspect of character defendant placed in issue and was responsive to the evidence produced by defendant. See *Johnson*, *supra* at 561; *People v Figgures*, 451 Mich 391, 399; 547 NW2d 673 (1996). Accordingly, the trial court did not abuse its discretion by admitting this evidence.

In the alternative, defendant argues that, if the trial court properly admitted Whelton's testimony, defense counsel was ineffective for "opening the door" to testimony regarding defendant's improper sexual behavior with children.

Because defendant failed to "move for a new trial or a *Ginther*[1] hearing, our review is limited to mistakes apparent from the record." *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (2000). As this Court also explained in *Henry* at 145-146:

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id*. at 687.

Here, defendant has not shown that defense counsel was ineffective for asserting the defense of defendant's character for good sexual morals in the presence of children. Nothing in the record indicates that defense counsel knew about Whelton's potential rebuttal testimony or that he knew defendant had repeatedly revealed his sexual attraction to young girls to his co-workers. Clearly, it was not objectively unreasonable for defense counsel to offer the testimony of four witnesses in the community who could testify to defendant's good character and reputation. Furthermore, as a rule, a trial counsel's decision to present a particular defense is a matter of trial strategy which we will not second-guess on appeal. *Henry, supra* at 148. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart*, 219 Mich App 38, 42; 444 NW2d 715 (1996).

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens

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[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).